MAHARIN NISHA HASSAN MOHAMED

v.

PANIR SELVAM CHELLAMUTHU & ANOR

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-623-2001]
12 SEPTEMBER 2005

CIVIL PROCEDURE: *Pleadings - Allegations of deception and fraud - Whether could be resolved by way of summons in chambers - Rules of the High Court 1980, O. 18 r. 8(1) - Whether defendants' application without merits*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application for - Whether there was undue and inordinate delay - Whether fatal*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application to set aside a judgment in default - Whether must be made in proceedings where judgment or order had been made - Whether by way of a lateral application in a different proceeding allowed*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application to set aside final judgment under O. 89 of the Rules of the High Court 1980 - Whether came within exception of illegality or lack of jurisdiction - Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*

The defendants, co-owners of a piece of land, had entered into a sale and purchase agreement ('SPA') with the plaintiff who as purchaser had paid RM10,000 to the defendants as vendors. Pursuant to the SPA, on 16 January 1999, the plaintiff had entered a private caveat against the land and on 17 January 2000 had obtained judgment in default of defendant's appearance. Thereafter, on 13 May 2002, the court had made final order in terms against the defendants in encl. (1) which was the originating summons filed by the plaintiff for an order of vacant possession of the land held under O. 89 of the Rules of the High Court 1980. By way of encl. 15, the defendants applied by way of summons in chambers under O. 92 r. 4 of the Rules of the High Court 1980 for *inter alia* leave to be granted to the defendants to make this application and to set aside the said judgments that the plaintiffs have obtained against the defendants, alleging there was deception and fraud involved. The defendants hence submitted that they were entitled to the prayers sought herein.

Held (dismissing the application):

[1] The defendants' claim for damages based on allegations of deception and fraud could hardly be resolved by way of summons in chambers supported by mere affidavits. Order 18 r. 8(1) of the Rules of the High Court contains matters which must be specifically pleaded and one such matter is fraud. Thus the resolution of the issue of fraud by way of summons in chambers was eminently unsuitable. A writ action was the proper mode of commencement of proceedings so that the parties may adduce *viva voce* evidence in support or in rebuttal. (p 293 c-d)

[2] Order 13 r. 8 of the Rules of the High Court 1980 empowers the court to set aside or vary any judgment entered in pursuance to O. 13. However, there was the issue of undue and inordinate delay. Even if the defendants had relied on O. 13 r. 8 and filed the necessary applications in order to persuade the court to exercise the discretion to set aside the aforesaid judgments, the defendants must under O. 42 r. 13 do so within 30 days after the receipt of the order or judgment by them. Here, the defendants have sought to set aside the aforesaid judgments when they were granted to the plaintiff some three to five years ago. The absence of an averment in the defendants' affidavit as to the reason for such undue and inordinate delay was fatal to the defendants' application. (p 293 g-h)

[3] The defendant's application to set aside a judgment in default given on 17 January 2002 must be made in the proceedings where the judgment or order had been made, and not by way of a lateral application in an entirely different proceeding altogether, as in this summons in chambers. (p 294 a)

[4] As for the order made in favour of the plaintiff on 13 May 2002 was a final judgment under O. 89 of the Rules of the High Court 1980, it was instructive to revisit the Federal Court judgment in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* where it was held that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction except where the final judgment could be proved to be null and void on ground of illegality or lack of jurisdiction. On the basis of the defendants' mere affidavits, the court was unable to arrive at a finding that this present case came within the exception *ie*, illegality or lack of jurisdiction enunciated in the judgment of *Badiaddin.* In the circumstances, the defendants should have lodged an appeal but had chosen not to do so. It was the court's view herein that the defendants' application was wholly without merits. (pp 294 f-h & 295 a)

Case(s) referred to:
Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd [2003] 3 AMR 417 ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***
Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 MLJ 178 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 67
Rules of the High Court 1980, O. 13 r. 8, O. 18 r. 8(1), O. 42 r. 13, O. 92 r. 4

For the plaintiff - Christina Edwin Jacob; M/s Zailan & Co
For the defendants - Uma Parvathy Thothathri; M/s Uma & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

This application provides an illustration of the importance of having a fundamental knowledge of the relevant procedural and substantive laws in civil litigation in order to enable an advocate and solicitor to enhance his or her competence as a learned member of the Bar.

Enclosure (15) is the defendants' application by way of summons in chambers under O. 92 r. 4 of the Rules of the High Court 1980 for the following orders:

1. Leave be granted to the defendants to make this application;
2. All proceedings be stayed until the hearing and determination of this application;
3. The judgments of Muhamad Ideres J given on 17 January 2000; of Hashim J (now JCA) given on 13 May 2002; and of Azhar J given on 22 May 2003 be set aside;
4. The sale and purchase agreement dated 11 November 1998 be declared null and void;
5. The land administrator concerned be ordered to cancel the transfer of the property to the plaintiff;
6. Damages amounting to RM1,000,000; and
7. Costs.

The defendants' application is based on deception and fraud allegedly perpetrated on them by the plaintiff.

All references hereinafter to an order and a rule are references to that order and rule in the Rules of the High Court 1980 unless the context otherwise requires.

Factual Background

The defendants have filed two affidavits in support, from which I shall narrate the averment of facts in essence for the purposes of providing a definitive decision in respect of this application.

The defendants were the former co-owners of land held under H.S.(D) 60178, Lot No. 18944 in the mukim of Rantau, district of Seremban ("the land").

In 1998, the defendants were in dire financial straits and had approached one Ibrahim, the plaintiff's husband, to ease the defendants' predicament. They have on 11 November 1998 entered into a sale and purchase agreement ("SPA") with the plaintiff who as purchaser has paid RM10,000 to the defendants as vendors. The defendants were represented by Messrs Zailan & Co a firm of solicitors ("Zailan & Co").

The defendants claimed that they could not understand English and the contents of the SPA in English were not interpreted to them.

The defendants' execution of the SPA was witnessed by one Tang Jay Soon whom the defendants claimed was not known to them, adding that the column to fill in the name of their solicitors had been left blank.

The completion date for the SPA was on or before 11 March 1999 and the redemption sum was to be paid to the chargee, Malaysia Building Society Bhd, from the balance of the purchase price.

On 16 January 1999, pursuant to the SPA, the plaintiff had entered a private caveat against the land.

The plaintiff had on 7 July 1999 received a copy of the SPA from Zailan & Co.

On 17 January 2000 *vide* Seremban High Court Civil Action No. 22-96-1999, the plaintiff had obtained judgment in default of defendants' appearance.

On 29 May 2000, the land was transferred to the plaintiff.

On 13 May 2002, Hashim J (now JCA) made a final order in terms against the defendants in encl. (1) which was the originating summons filed by the plaintiff for an order of vacant possession of the land under O. 89.

Fraud And Damages

Defendants' learned counsel Miss Uma Parvathy Thothathri had filed thick volumes of written submissions, the gist of which is to the effect that all the three judgments had been obtained by the plaintiff as a result of deception and fraud and the defendants are entitled to the prayers sought in this summons in chambers.

Miss Christina Edwin Jacob, plaintiff's learned counsel, contended that the defendants' allegation of deception and fraud has never been raised before and has now been raised as an afterthought.

In my view, the defendants' claim for damages based on allegations of deception and fraud can hardly be resolved by way of summons in chambers which is supported by mere affidavits. Order 18 r. 8(1) contains matters which must be specifically pleaded and one such matter is fraud. It means that the resolution of the issue of fraud by way of summons in chambers is eminently unsuitable. Obviously, a writ action is the proper mode of commencement of proceedings so that the parties may adduce *viva voce* evidence in support or in rebuttal. The parties must also be accorded the opportunity to embark upon a careful cross-examination and re-examination in order to assist the court in evaluating the evidence with a view to arriving at a well-considered finding of facts.

Setting Aside Judgments

It was contended for the plaintiff that under O. 13 r. 8 and O. 42 r. 13, the time limited for applying to set aside a judgment in default is 30 days from the date of receiving the judgment or order and that the application must be filed in Seremban High Court Civil Action No. 22-96-1999 and not in this originating summons, being different proceedings. *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC was cited in support.

I am unable to find any submission of substance for the defendants on this issue.

In my judgment, it is clear that O. 13 r. 8 empowers the court to set aside or vary any judgment entered in pursuance of O. 13. However, there is the issue of undue and inordinate delay. Even if the defendants had relied on O. 13 r. 8 and filed the necessary applications in order to persuade the court to exercise the discretion to set aside the aforesaid three judgments, the defendants must under O. 42 r. 13 do so within 30 days after the receipt of the order or judgment by them. However, the defendants have sought to set aside the aforesaid three judgments now when those judgments were granted to the plaintiff some three to five years ago. The absence of an averment in the defendants' affidavit as to the reason for such undue and inordinate delay is obviously fatal to the defendants' application.

Further, the defendants' application to set aside a judgment in default given by the learned judge on 17 January 2002 in Civil Action No. 22-96-1999 must be made in the proceedings where the judgment or order has been made, and not by way of a lateral application in an entirely different proceeding altogether, as in this summons in chambers.

In *Badiaddin, supra,* one of the judgments of the Federal Court was delivered by Peh Swee Chin FCJ (as he then was) who at p. 103 held, *inter alia,* as follows:

> It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its validity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first. When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding …

Procedure For Appeal

The plaintiff took the view that as the order made by Hashim J (now JCA) is a final order, the defendants should have appealed, referring to *Badiaddin, supra*; and *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553 CA.

There was no response of any merit from the defendants' counsel.

As the order made in favour of the plaintiff on 13 May 2002 is a final judgment under O. 89, it is instructive to revisit the Federal Court judgment in *Badiaddin, supra.* Mohd Azmi FCJ (as he then was) held at p. 112 as follows:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

This was followed by the Court of Appeal in *Tenaga Nasional Bhd, supra,* (per Gopal Sri Ram JCA at pp. 561 to 562).

On the basis of the defendants' mere affidavits, I am unable to arrive at a finding that this case comes within the exception ie, illegality or lack of jurisdiction enunciated in the judgment of Mohd Azmi FCJ above. In the circumstances, the defendants should have lodged an appeal, but has chosen not to do so.

Order 92 r. 4

The plaintiff asked the court not to invoke the inherent powers of the court where rules contain provisions making available sufficient remedies, on the basis of *Affin Bank Bhd (formerly known as Perwira Affin Bank Berhad) v. WT Low & Ng Realty Sdn Bhd* [2003] 3 AMR 417 HC.

The defendants relied on O. 92 r. 4 which reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

In my view, although O. 92 r. 4 appears to be wide in scope, it is not a carte blanche. There must be a proper basis for it to be invoked. It has been so succinctly stated by Syed Agil Barakbah SCJ in Permodalan *MBF Sdn. Bhd. v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors.* [1988] 1 MLJ 178 that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers. (See also *Affin Bank, supra,* per Abdul Malik Ishak J, at pp. 424 to 425).

In the instant application, apart from O. 13 r. 8 and O. 42 r. 13, s. 67 of the Courts of Judicature Act 1964, confers upon the defendants the right to invoke the jurisdiction of the Court of Appeal by preferring an appeal against any of the three judgments or orders of the High Court. There are therefore sufficient remedies under the Rules of the High Court 1980 and the Courts of Judicature Act 1964 for the defendants to pursue if the defendants were mindful of these remedies and had acted timeously.

Conclusion

On the foregoing grounds, I hold that the defendants' application is wholly without merits and is hereby dismissed with costs.